

HUMAN RIGHTS IN THE SENSE OF THE NEW BASIC LAW

LÓRÁNT CSINK

Pázmány Péter Catholic University, Budapest

Since the 20th century globalisation plays a great role also in the sphere of public law. Many international charters were born for the protection of human rights and states undertook serious obligations for applying efficient mechanisms for their protection. Besides the classical safeguards of human rights there emerged relatively new institutions for the same purpose both on international level and on the level of the European Union to form a system that is called multi-level constitutionalism.

However, this fact does not reduce the role of national constitutions and of national courts and constitutional courts. Experiences show that the national institutions of protection are still the most common and most efficient ones to grant remedies for any anomalies. Primarily, states are responsible for the implementation of human rights; the international protection is rather supplementary. On the other hand, the national system of protection has to meet the criteria of international standards. Therefore it is not a surprise that a new constitution is evaluated by the international community in this regard, like in the case of Hungary's new Basic Law.

“Give me a place to stand on and I will move the Earth” says Archimedes referring to the fact that without solid ground no movements can be made. But where can we find solid grounds these days? Hungary's national constitution has just changed and the European Union also has to face serious challenges both politically and economically. Therefore, it is not an easy task to evaluate the level of protection of human rights. In this essay I am seeking the factors that determine the level of human rights' protection. Consequently, the question arises: what criteria should the legal system meet in order to grant efficient protection for human rights, i.e. what are the conditions of the protection?

Law is not almighty. Laws in themselves cannot create a democratic society respecting human rights. Laws can only set the frameworks of democracy, the conditions upon which human rights can prevail in everyday relations. However, in this essay I focus on the role of national constitutions in the protection of human rights.

What does determine the level of human rights' protection? In this essay I point out three factors:

1. The text of the constitution,
2. The aspects beyond the text, and
3. The institutional guarantees.

I. Textual differences between the Basic Law and the Constitution

Regarding the particular provisions, the new Hungarian Basic Law is quite similar to the Constitution being in force until 31 December 2011. Although the Basic Law has apparent provisions, the changes are rather rhetorical than influential relating human rights. For instance, it declares that marriage can be concluded between a man and a woman consequently it excludes same-sex couples (Article L). It contains a provision on the protection of foetal life leading to slippery questions concerning abortion (Article II). Furthermore, it declares social security to be an aim of the state (*Staatsziel* in the German doctrine) instead of referring to it as a human right (Article XIX).

Although the former Constitution explicitly regulated differently, in the constitutional adjudication the aforementioned institutions prevailed in the same content as the regulations of the Basic Law. The Constitutional Court declared in 1995 that marriage is a union of a man and a woman;¹ and it stated in 1998 that the protection of the foetus constitutionally limits the privacy of the pregnant woman.² Similarly, in the jurisprudence of the Constitutional Court social security is rather the obligation of the State than the citizens' right.³ The Basic Law was also blamed for not

¹ Decision 14/1995 CC

² Decision 48/1998 CC

³ Decision 43/1995 CC

declaring the prohibition of capital punishment.⁴ However, introducing capital punishment is not a real option in the middle of Europe; therefore one cannot evaluate it as a derogation of the level of constitutional protection. Furthermore, Article XIV para (2) states that “*No person shall be expelled or extradited to a state where he or she is threatened to be sentenced to death or to be subjected to torture or to inhuman treatment or punishment*”. This rule can be interpreted as the implicit prohibition of capital punishment.⁵

Accordingly, I presume that in these questions the constitutional adjudication will not change too much. Nonetheless, there are changes in the text of the Basic Law. I find it the most dubious that Article IV makes life imprisonment possible. Although there are countries making life imprisonment possible, many say that such a punishment is contrary to human dignity.

According to the first aspect, I do not find very significant differences between the text of the Constitution and that of the Basic Law.

II. The philosophical background of the Basic Law

Besides the provisions of the Basic Law, there are some other aspects influencing the protection of human rights that are beyond the text. Despite of the similarities, there is a huge difference in this regard. The recent frameworks of the Constitution were set at the roundtable talks during the political transition. In 1989 the roundtable talk opposed the socialist theory that found the community the most basic entity and, as a contrast, it rooted in individualism. The human being became the most important element of the society.

Twenty years thereafter, when societies face political and moral crisis, the role of family and other communities strengthened. Many have thought

⁴ Opinion 621/2011 of the Venice Commission, CDL-AD(2011)016. Item 68.

⁵ Zsolt BALOGH – Barnabás HAJAS: Rights and Freedoms. In: *The Basic Law of Hungary – A First Commentary*. Clarus, Dublin, 2012. p. 88.

that the individual is not strong enough and small communities could have a great part even in the field of economy.

Consequently, not the level of protection of the fundamental rights, but the approach of their protection has changed. The Basic Law has a new vision of human beings, who are the subjects of the rights and responsibilities. As Article O states, “*every person shall be responsible for himself or herself, and shall be obliged to contribute to the performance of the state and community tasks in proportion to his or her abilities and possibilities*”.⁶ Unlike the Constitution, the Basic Law uses more public spirit in the field of fundamental rights and bases less upon the individualist approach.⁷ It can be seen from a provision of the National Avowal stating that “*We believe that individual freedom can only be complete in cooperation with others*”. Similarly, Article XII states: “*Every person shall have the obligation to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.*” It can refer to an obligation to work for the benefit of the community according to one’s abilities and potential, but also to the general and proportionate sharing in taxation in connection with work.⁸

This concept stands close to the communitarian political philosophy, which relies on the individual, as a part of a certain community, and who is able to define his or her identity only through these communities. This philosophy says that the total autonomy of the individual is a fiction, and the personal identity is embedded into the community. This is why it is impossible to understand the individual without external strongholds.⁹ As a consequence, the importance of sustainability (budget management, natural resources, environmental protection) has also increased.

⁶ This provision is very similar to Article 6 of the Federal Constitution of the Swiss Confederation: „All individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society.”

⁷ Lóránt CSINK – Johanna FRÖHLICH: The new Hungarian Basic Law – Preliminaries and Consequences. *Forum Prawnicze* 2012/2 (under publishing).

⁸ BALOGH – HAJAS, op. cit. p. 87.

⁹ Ferenc HÖRCHER: Közösségelvű politikai filozófiák. [Communitarian Political Philosophies] *Századvég*, Budapest, 2002. p. 21-22.

One cannot choose among philosophical values by scientific approach. In the frameworks of law one cannot say that solidarity is better than individualism or conversely, individualism is better than solidarity. It is an important question whether the different philosophy involves the legal system. Politically the Basic Law is successful only if the society accepts this philosophy. The judiciary and the Constitutional Court will have a great part again: if they apply not only the mere provisions of the Basic Law but also its philosophy that will result in a different approach of human rights.

III. Institutional guarantees

Regarding the institutional guarantees I only point out the most basic alterations in the field of constitutional adjudication.

The most spectacular change in the field of state organisation seems to be that the examination of individual complaints became the characteristic of the Constitutional Court instead of the posterior law review. According to the Basic Law, not only unconstitutional laws but also unconstitutional jurisdiction can be reviewed in the competence of constitutional complaint. Necessarily, the importance of abstract posterior law review reduces and *actio popularis* terminates. Comparative experiences show that the constitutional complaint and the abstract review cannot be “powerful” at the same time; one of them is always the general rule and the other one is the exception.¹⁰

Although the Constitutional Court is referred to as the supreme body for the protection of the Basic Law [Article 24 paragraph (1)], it predictably will be the protector of fundamental rights and not of the Basic Law. The Constitutional Court will have to safeguard constitutionality in particular cases, its main task will not be the maintenance of the integrity of the Basic Law (as it was upon the Constitution).

¹⁰ Lóránt CSINK – Balázs SCHANDA: The Constitutional Court. In: *The Basic Law of Hungary – A First Commentary*. Clarus, Dublin, 2012. p. 162.

The Basic Law has created a clear hierarchy in the interpretation of the content of human rights. Consequently, the requirements of human rights will emerge in ordinary judiciary. As the Constitutional Court reviews the constitutionality of the particular decisions, judges, if they do not want their decisions annulled, will consider the aspects of human rights. Furthermore, these requirements will also turn up in the administration, as administrative decisions are reviewed by courts.

Accordingly, the mechanism of constitutional protection seems to strengthen. However, there are some shades making me less optimistic. Namely, in 2010 the Parliament, referring to a “state of economic crisis”, amended the Constitution and the Act on the Constitutional Court in order to restrict the constitutional review of financial laws. The immediate antecedent of the limitation of the competence was that the Constitutional Court annulled an Act on taxes that would confiscate high severance pays and other public payments retroactively. The Government referred that the limitation is crucial to the financial stability of the country. It is noteworthy that the Constitutional Court’s decisions on financial issues were always disputed, like in 1995, when the Constitutional Court annulled the withdrawal of certain allowances granted for mothers to bring up children,¹¹ or in 2008, when the Constitutional Court found several Acts on taxes unconstitutional.¹² In a theoretical aspect, this regulation is controversial; it infringes formal constitutionality: without judicial review there is no guarantee that the regulations of the Constitution on financial issues prevail in practice.

A serious critic towards the Basic Law seems to be that it maintained the text of the Constitution according to its amendment in 2010, restricting the review of financial laws. Although Article 37 paragraph (4) states that the restriction terminates when the state debt goes under the 50% of the GDP, regarding the state of the finances, it is unlikely to happen in the near future.

Finally, a provision of the new Act on the Constitutional Court needs mentioning. Article 29 states “*The Constitutional Court accepts the*

¹¹ Decision 43/1995 CC

¹² Decision 155/2008 CC

constitutional complaint if the infringement of the Basic Law involved the judicial decision in merits or if the question has a fundamental significance for constitutional law". A possible interpretation of this provision seems to be that the Constitutional Court will not be obliged to deal with all the cases in merits.

Such a procedure is not uncommon; for instance the German Constitutional Court or the Supreme Court of the United States might also sort out the cases it intends to deal with. Such a procedure helps the Court to involve the really important cases instead of the manifestly ill-founded petitions.

On the other hand, the selection among the cases cannot be arbitrary. This provision could also result in the outcome that some petitioners whose claim is well-founded do not find remedy, just because their case is not significant enough for constitutional law. Therefore, it is necessary for the Court to create the objective criteria upon which it can impartially justify whether the petition is accepted or not.

IV. Conclusions

To sum up, I have come to the following conclusions concerning the level of protection of human rights under the new Basic Law.

Firstly, the constitutional provisions pertaining to fundamental rights remained mostly unaltered in merits. Secondly, the Basic Law was written in a different philosophy than the Constitution was. Thirdly, the mechanism for the protection of human rights has strengthened; nonetheless there are some circumstances (like the limitation of the Court's competence and certain provisions of the Act on the Constitutional Court) that may derogate the level of protection. It will be the Constitutional Court's basic task to minimise these factors.

I do not believe that a constitution can be responsible for all the problems of the society. It cannot heal them either. The constitution's role is to create the framework of an efficient protection. I presume that despite all

of the weaknesses, the Basic Law is able to fulfil this task, and I do hope it will.

SUMMARY

Human Rights in the Sense of the New Basic Law

LÓRÁNT CSINK

The protection of human rights should be one of the most basic purposes of every constitution. Such rights are the achievements of historical development; they have a very similar content in the European national constitutions and in international conventions. However, the history of human rights is rather short in Hungary. The beginnings of the acknowledgement of human rights in merits are dated back to the political transition in 1989, nonetheless the protection soon reached the European standard with the help of the Constitutional Court. The question arises: how will the Basic Law change the Constitutional Court's role in protecting human rights? While seeking the answer, my presentation focuses on three topics: firstly, the differences between the Constitution and the Basic Law; secondly, the role of the Constitutional Court according to the Basic Law; and finally the role of constitutional interpretation.

RESÜMEE

Die Menschenrechte im Sinne des neuen ungarischen Grundgesetzes

LÓRÁNT CSINK

Eines der wichtigsten Ziele einer jeden Verfassung muss es sein, die Menschenrechte zu wahren. Diese Rechte sind das Ergebnis einer

historischen Entwicklung. Ihr Inhalt ist in der Verfassung der einzelnen europäischen Länder und in den internationalen Übereinkommen sehr ähnlich. In Ungarn können jedoch die Menschenrechte auf eine verhältnismäßig kurze Vergangenheit zurückblicken. Die Anfänge der tatsächlichen Anerkennung der Menschenrechte fanden zur Zeit der Wende 1989 statt. Trotzdem stieg dieser Schutz, dank der Tätigkeit des Verfassungsgerichts, innerhalb kurzer Zeit auf das europäische Niveau an. Es stellt sich die Frage, wie das neue ungarische Grundgesetz (*Alaptörvény*) diejenige Rolle verändern wird, die bisher vom Verfassungsgericht beim Schutz der Menschenrechte eingenommen wurde? Bei der Beantwortung der Frage konzentriere ich mich auf drei Themen: erstens auf die Unterschiede zwischen der Verfassung und dem Grundgesetz; zweitens darauf, wie das Grundgesetz die Funktionen des Verfassungsgerichts bestimmt; und schließlich auf die Frage, welche Rolle die Auslegung der Verfassung spielt.